

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
10

11 DIANNE DODD, o/b/o N. J. P.,) No. ED CV 06-00414-VBK
12)
13 Plaintiff,) MEMORANDUM OPINION
14) AND ORDER
15 v.)
16) (Social Security Case)
17 JO ANNE B. BARNHART,)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
22 _____)
23)
24)
25)
26)
27)
28)

18 This matter is before the Court for review of the decision by the
19 Commissioner of Social Security denying Plaintiff's application for
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have
21 consented that the case may be handled by the Magistrate Judge. The
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to
23 enter judgment upon the pleadings and certified Administrative Record
24 ("AR") before the Commissioner. The parties have filed the Joint
25 Stipulation ("JS"), and the Commissioner has filed the certified AR.
26 After reviewing the matter, the Court concludes that the decision of
27 the Commissioner must be reversed and the matter remanded for further
28 hearing.

1 Plaintiff raises two issues: that the Administrative Law Judge
2 ("ALJ") failed to develop the record, and failed to consider non-
3 medical evidence.

4 At the hearing held on August 26, 2005 (AR 161-176), Plaintiff
5 appeared without counsel. Although the ALJ adequately advised
6 Plaintiff of her right to be represented (see AR 164, et seq.), the
7 colloquy between Plaintiff and the ALJ seems to indicate that
8 Plaintiff wanted legal assistance. (See AR at 164.) The ALJ offered
9 to continue the hearing to permit Plaintiff to obtain representation,
10 but moments later, declined to continue the matter any further. (See
11 AR 165.) As Plaintiff points out, the ALJ had offered to conduct
12 further proceedings if she obtained counsel (see, id.). Plaintiff did
13 obtain counsel (the same counsel who now represents her in this
14 action) on February 7, 2006 (AR 154-155), and her counsel requested a
15 review of the hearing decision. (AR 8.) Despite Plaintiff's claim
16 that the ALJ's offer to reopen proceedings was reneged upon, there is
17 nothing in the record to indicate that Plaintiff's counsel asked to
18 reopen proceedings. In and of itself, therefore, if the failure or
19 refusal of the Commissioner to reopen proceedings is an issue in this
20 litigation, it has no merit.

21 What is clear is that the record is seriously undeveloped, and
22 what evidence is in the record is clearly insufficient to constitute
23 substantial evidence to support the ALJ's decision. Although the ALJ
24 was obviously aware of and in fact summarized regulations which govern
25 determination of disability in minors (see AR at 14-16), the balance
26 of the ALJ's decision fairly ignores the relative dearth of evidence
27 in the record. Plaintiff's child, Norma Jean Pullen (hereinafter
28 "Norma"), was born on June 18, 2002, and was thus three years old at

1 the time of the hearing. (AR 102.)¹ It was asserted that she was
2 disabled because of seizures. (AR 56.) Her treating physician is Dr.
3 Vo (AR 57), who first saw her on August 15, 2003 because of seizures.
4 (AR 57.) The file contains a "Seizure Questionnaire" (AR 88-90),
5 which, curiously, is unsigned and undated. The frequency of seizures
6 is stated to be "periodic," with the last four seizures being noted to
7 have occurred on December 7, 2003, December 14, 2003, December 28,
8 2003, and January 27, 2004. It is asserted that Norma loses
9 consciousness, has convulsions, and that the seizures last 50 to 60
10 minutes. (AR 88.) Plaintiff reiterated this testimony at the hearing
11 (AR 167-168), adding that during the seizures, Norma sometimes loses
12 control of her bowel or her bladder, and that the seizures last about
13 15 minutes. (AR 168.) The discrepancy concerning the length of the
14 seizures was not inquired into by the ALJ.

15 The file contains progress notes of Dr. Vo for the period of June
16 24, 2002 through March 17, 2004. (AR 103-132.) In addition, there are
17 hospital records. On December 11, 2003, Norma was admitted to the
18 Community Hospital of San Bernardino for the reason of "new onset
19 seizures." (AR 135-136.) There are also two pages of hospital records
20 for the same facility for the period of February 16, 2004, indicating
21 an admission because of gastroenteritis and dehydration. (AR 133-134.)
22 The Court notes that at the hearing, these hospitalizations were not
23 discussed at all; rather, the only question posed by the ALJ concerned
24 the last time that Norma was hospitalized. (AR 169-170.) The Court

26 ¹ Although Plaintiff asserts that Norma was born on August 15,
27 2003 (see JS at 3), and the ALJ also adopted this date (see AR at 16),
28 the medical records indicate a date of birth of June 18, 2002. (See AR
at 102.) August 15, 2003 is the alleged onset date of disability.
(See AR at 56.)

1 also finds it peculiar that in the portion of the ALJ's decision
2 entitled "Evaluation of the Evidence and Rationale," there is no
3 reference whatsoever to these two hospitalizations. It would appear
4 that this documentation was before the ALJ at the time the decision
5 was written, as the only notation concerning additional evidence
6 submitted to the Appeals Council references treatment records ending
7 February 2, 2006 from La Salle Medical Associates. (AR at 7.) After
8 Plaintiff obtained counsel, he filed a Request for Review of Hearing
9 Decision/Order, referencing this additional medical evidence. (See AR
10 at 154-160.)

11 The procedures which the Commissioner must follow in determining
12 the existence of a childhood disability are extensive and detailed.
13 One of these regulations is 20 C.F.R. §416.926a(b), which is
14 referenced by the ALJ in his decision. (See AR at 18-19.) It is clear
15 that in order to perform the analysis required by this regulation,
16 substantial information regarding the child's activities and abilities
17 must be in the record. Despite that requirement, there is little or
18 no medical evidence in the record pertinent to this determination, and
19 the ALJ almost totally failed to elicit information from Plaintiff at
20 the hearing concerning these matters. As a result, both the ALJ, and
21 now the Commissioner in this action, rely on literal snippets of
22 information in Dr. Vo's progress records to answer the important
23 questions which the regulations require to be addressed. The
24 Commissioner, unfortunately, misstates the record. For example, it is
25 urged upon the Court that the ALJ in fact did ask Plaintiff questions
26 as to whether Norma had been hospitalized in the past. (See JS at 9,
27 citing AR at 169-170.) The actual question, however, was, "When was
28 the last time that she was hospitalized, actually in there over night

1 as a bed patient? This year?" (AR at 169.) This abbreviated
2 question, lacking any followup, failed to reveal the other
3 hospitalizations which the Court notes were in the record, and which
4 the ALJ apparently decided, in any event, to ignore. Further, the
5 Commissioner asserts that Norma's seizure disorder was under control
6 due to her prescribed medication of phenobarbital. (See JS at 10,
7 citing AR 147-152, 169.) Indeed, even a microscopic search of Dr.
8 Vo's records only reveals isolated expressions such as "under control"
9 (see AR at 103, referencing an examination dated March 17, 2004).
10 While the ALJ substantially discounted the credibility of the mother's
11 assertions concerning Norma's seizure disorders (see AR at 19-20), the
12 Commissioner specifically cites the mother's testimony at the hearing
13 to support a medical conclusion that "Plaintiff's seizure disorder was
14 under control due to her prescribed medication of phenobarbital" (JS
15 at 10):

16 "Q Okay. Now, since she's been on that [phenobarbital], has
17 that helped the seizures at all?

18 A Yeah."

19 (AR at 169.)
20

21 While Plaintiff is certainly a caring mother, her ability to
22 diagnose ailments is no greater than that of any other lay person.
23 For example, immediately following Plaintiff's testimony that the
24 phenobarbital has provided some help with regard to the seizures, she
25 described the reason for Norma's hospitalization over a two-day
26 period, which occurred several weeks before the hearing, as due to a
27 cold. (AR 169-170.) Although the ALJ expressed some apparent surprise
28 that a child would be hospitalized overnight (much less for two days)

1 for a cold (see AR at 170), that was the end of the matter, and no
2 followup was done to obtain these records. Finally, despite the
3 Commissioner's apparent willingness to accept the child's mother's
4 diagnostic opinion that phenobarbital has effectively cured the
5 seizures, no attention was paid to Plaintiff's testimony that in 2005,
6 Norma had four seizures. (AR 168.)

7 As the Court has noted, the regulations governing determination
8 of childhood disabilities are very specific and demanding. In order
9 to make this determination, very detailed information must be
10 considered by the decision-maker concerning, for example, the child's
11 ability to function in a home or school setting, the nature and level
12 of activities of which the child is capable, and a comparison of the
13 child's functioning to the functioning of other children of similar
14 age. (See 20 C.F.R. §416.924a.) The ALJ's questions of Plaintiff at
15 the hearing were, to put it charitably, inadequate and insufficient.
16 With regard to Norma's school functioning, the following is the only
17 evidence in the record from the hearing:

18 "Q Okay. How does she get along in school?

19 A Good."

20 (See AR at 171.)
21

22 The balance of questioning regarding Norma's functioning and
23 abilities is equally brief and inconclusive. (See AR at 171-172.)
24 Despite an almost total absence of competent evidence, the ALJ
25 concluded that Norma's impairments caused her no limitations in the
26 domains addressed by 20 C.F.R. §416.926a. (See AR at 19.) Not only is
27 there a lack of substantial evidence to support these conclusions, but
28 there is no competent evidence whatsoever.

1 Finally, the Court will briefly address Plaintiff's contention
2 that the ALJ did not properly consider the non-medical evidence before
3 him, specifically, the extensive statements at the hearing of Norma's
4 grandmother (AR 173-175), who provided specific information to the ALJ
5 that the phenobarbital, which supposedly controls Norma's seizures,
6 may have caused serious side effects, as observed by the grandmother,
7 who stated, "The medication have [sic] messed up her teeth." (AR 173.)
8 Norma's grandmother also believed that Norma would have to be admitted
9 to Loma Linda (presumably the medical center) to remove her teeth, or
10 at least to clean the gums. (AR 174.) Despite an extensive colloquy
11 between Norma's grandmother and the ALJ about these matters, no
12 apparent followup was done. Query how the Commissioner can conclude
13 that this medication controls the seizures, without attempting to
14 properly evaluate whether evidence that the medication may be having
15 serious side effects is or is not credible. The Court cannot take
16 seriously the Commissioner's argument (see JS at 12) that the ALJ was
17 free to ignore the grandmother's information because she was merely an
18 "observer." This position flies in the face of the Commissioner's
19 regulatory obligation to consider relevant information from a variety
20 of sources. See 20 C.F.R. §416.924a(a).

21 This Court cannot recall another case in which a determination of
22 disability was made in such an absence of competent evidence, and in
23 contravention of the stringent requirements of controlling
24 regulations. The Court cannot conceive how the disability issue in
25 this case can be determined, at the least, without a neurological
26 examination.

27 //

28 //

1 For the foregoing reasons, the decision of the Commissioner is
2 reversed and this matter is remanded for a new hearing consistent with
3 this Memorandum Opinion.

4 **IT IS SO ORDERED.**

5
6 DATED: January 26, 2007

7
8 /s/
VICTOR B. KENTON
9 UNITED STATES MAGISTRATE JUDGE
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28